

LAW OFFICE OF JOHN R. BAGILEO

GEORGETOWN PLACE

SUITE 300

1101 30TH STREET, N.W.

WASHINGTON, D.C. 20007

JOHN R. BAGILEO  
DIRECT: (202) 298-4760

213452  
TELEPHONE: (202) 944-3734  
FACSIMILE: (202) 944-8611  
E-MAIL: jrb@bagileolaw.com

March 2, 2005

Vernon A. Williams  
Secretary  
Surface Transportation Board  
The Mercury Building  
1925 K Street, NW #700  
Washington, DC 20423

ENTERED  
Office of Proceedings

MAR -2 2005

Part of  
Public Record

Re: STB Ex Parte No. 656  
Motor Carrier Bureaus—Periodic Review Proceeding

Dear Secretary Williams:

Enclosed please find the original and ten copies of the Comments of National Motor Freight Traffic Association, Inc. (NMFTA) and the National Classification Committee (NCC) in response to the Surface Transportation Board's Decision served in the above-styled proceeding on December 13, 2004. Also enclosed is an IBM-compatible floppy disk in Microsoft Word.

NMFTA is the applicant in Section 5a Application No. 61.

Thank you for your assistance in this matter.

Sincerely,

*John R. Bagileo*

John R. Bagileo  
Counsel for National Motor Freight Traffic  
Association, Inc. and the National  
Classification Committee

Enclosures

213452

ORIGINAL

Before The  
Surface Transportation Board

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STB Ex Parte No. 656  
Motor Carrier Bureaus—Periodic Review Proceeding

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Comments Of  
National Motor Freight Traffic Association, Inc.  
And The  
National Classification Committee  
Section 5a Application No. 61

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John R. Bagileo  
Law Office of John R. Bagileo  
1101 30th Street, NW  
Suite 300  
Washington, DC 20007  
Phone: (202) 944-3736  
FAX: (202) 944-8611

Counsel for National Motor Freight  
Traffic Association, Inc. and the  
National Classification Committee

Due and Dated: March 2, 2005

Before The  
Surface Transportation Board

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STB Ex Parte No. 656  
Motor Carrier Bureaus—Periodic Review Proceeding

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Comments Of  
National Motor Freight Traffic Association, Inc.  
And The  
National Classification Committee  
Section 5a Application No. 61

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The National Motor Freight Traffic Association, Inc. (NMFTA) and the National Classification Committee (NCC), by counsel, files these comments in response to the Surface Transportation Board's Decision in the above-styled proceeding. Following are the Statements of William W. Pugh, NMFTA's Executive Director and Secretary to the NCC; Joel L. Ringer, NMFTA's Manager of Classification Development; and counsel's argument. In support of the continuation of the NCC's Section 5a Agreement with antitrust immunity, it is respectfully stated as follows:

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**SECTION I**

**STATEMENT OF**

**WILLIAM W. PUGH**

**I**  
**STATEMENT OF**  
**WILLIAM W. PUGH**

My name is William W. Pugh. Since November 7, 2001, I have been the Executive Director of the National Motor Freight Traffic Association (NMFTA). For the previous 25 years, I served as NMFTA's General Counsel. In the capacities in which I've served NMFTA I have become conversant with the National Motor Freight Classification (NMFC) as well as the procedures by which it is maintained and the legal constraints and challenges that are applicable to the classification process.

The purpose of this statement is to respond to the Board's notice served December 13, 2004, initiating its statutory review that is a prerequisite to renewal of the collective activities agreements of various motor carrier bureaus. These agreements include the National Classification Committee's (NCC's) (Sec. 5a Application No. 61) Agreement. The notice requests each applicant for renewed authority to submit a statement indicating that it desires to continue to have its agreement approved by the Board. The notice also seeks information relevant to whether the NCC's agreement, as recently amended, is functioning in accord with the requirements stated in the STB's November 2001 decision in Section 5a Application No. 61 (Sub-No. 6). More specifically, the Board inquires whether anything affecting the public interest has changed since the prior review cycle. In the prior review cycle the NCC implemented changes in their procedures that would: (1) supply shippers with specified additional information at an earlier stage in the classification process; (2) resolve the classification docket with a single expedited decision and (3) give shippers who disagree with an initial

classification decision the right to seek review of that decision by a neutral arbitrator.

The following will respond to these inquiries, but first I would offer some background that is needed to put this statement into a meaningful context.

**A. The Classification Described**

The NMFC is a freight classification that is developed and maintained by the NCC and NMFTA on behalf of approximately 1200 participating motor carriers. The principal objective of a freight classification is to promote the equitable distribution of the carriers' transportation burden and the fair treatment of their shipper customers. To accomplish this purpose, the Classification groups each of the myriad commodities moving in commerce into a limited number of classes that are reflective of their "transportability" or the service demands that the transportation of each commodity imposes on the motor carrier. Eighty five years ago in Director General v. Viscose Company 254 US 503 (1921) the Supreme Court provided the following description of freight classification, which is still accurate:

Classification in carrier ratemaking practice is grouping -- the association in a designated list, commodities which because of their inherent qualities of value, or the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded and the like, may be justly and conveniently be given similar rates.

These groupings, or classes, facilitate the assessment of similar charges to the movement of products having comparable transportation characteristics. The freight charges that compensate the motor carrier for its transportation of a product with identified transportation characteristics between given points are derived from a rate

tariff, contract, or price list. The determination of rates is based on carrier's costs and related issues. It is an entirely separate function from the classification.

The classes assigned to each commodity are determined through an analysis of a standard set of four composite transportation characteristics which was prescribed by the I.C.C., in Ex Parte No. MC-98 (Sub-No. 1), Investigation into Motor Carrier Classification<sup>1</sup>. This characteristic set includes the commodity's density, stowability, handling and liability characteristics. Together, these four transportation characteristics comprise all factors that bear on the transportation of commodities moving in LTL motor carrier service.

The NMFC itself is divided into several sections. The first lists the participating carriers. The second section sets forth the rules governing the application and use of the classification, and general packaging requirements for commodities. The second section also includes the Uniform Bill of Lading and its terms, conditions and formats. The heart of the NMFC is the "Articles" section, which provides approximately 8000 items that describe the countless thousands of "general commodities" moving via LTL motor carriers and group them into classes based on their transportation characteristics. This is followed by specifications of certain numbered packages. Within the Articles section the commodity descriptions are indexed alphabetically. As indicated, commodities that demonstrate the same or comparable transportation characteristics are properly assigned the same class. The NMFC provides 18 such classes ranging from class 50 to class 500, with class 50 representing the most favorable transportation characteristics while class 500 represents the least favorable characteristics.

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<sup>1</sup> 367 ICC 243,258 and 367 ICC 715-717 (1983).



**B. The Classification Must Be Amended to Reflect Continuous Changes  
In Commodity Transportation Characteristics**

New products are constantly entering the stream of commerce while existing products are evolving due to changes in their design or the materials used in their construction. Consequently, a freight classification must be a dynamic mechanism which is continuously amended and updated to reflect the changing transportation characteristics of the myriad products moving in commerce. For example, when the components of a product consisting of heavy-density materials, such as wood or steel, are replaced by lighter weight (less dense) materials, such as plastic, the result is apt to be a substantial change in the involved product's transportation characteristics. As presently constructed and tendered for shipment, the plastic product may be more susceptible to damage, more difficult to handle, more difficult to stow properly in the vehicle, and perhaps more importantly, its density may have declined markedly. Such changes in a commodity's transportation characteristics must be expeditiously identified and necessary adjustments made to its classification, so that the assigned class will fairly and appropriately reflect the commodity's present transportation characteristics.

The organization responsible for the content of the NMFC is the NCC - an autonomous standing committee of the NMFTA. The NCC has the legal obligation of ensuring that the NMFC is reasonable, which means that it must accurately reflect the transportability of the commodities it encompasses [49 USC §13703(a)(5)(A)]. Moreover, the Classification must be maintained and adjusted constantly so that it can continue to provide reasonable relationships among the commodities it identifies and the

shipments moving under its provisions will continue to support their fair share of the transportation burden.

In maintaining the Classification, the NCC strictly adheres to the procedures set out in its National Motor Freight Classification Agreement (see Attachment A of the accompanying Statement of Mr Joel Ringer). The initial version of the NCC's classification-making agreement was approved by the ICC in 1956. And it has evolved continuously since then, with the latest version being given final approval by the STB in a decision served December 10, 2003.

In accord with its current Agreement, the NCC consists of not more than 100 elected or appointed members (officers, owners or full-time employees of motor carriers) representing the 50 states, the District of Columbia, Canada and Mexico. It is charged with the duty of investigating and considering matters affecting the classification of commodities, docketing classification proposals, considering classification proposals docketed by others, and finally, deciding and prescribing the contents, provisions, rules, regulations, and classes of the NMFC.

**C. The NMFC Is Maintained and Updated Pursuant to Open Public Procedures Which Have Been Recently Revised to Further Insure All Interested Parties a Full and Fair Opportunity To Participate in the Classification-Making Process**

Necessary changes and adjustments to the NMFC are made in open public meetings which have been duly noticed or "sunshined". These sunshined meetings are conducted under procedures that have been approved by the ICC and the STB. In fact, only last year, pursuant to the STB's most recent decisions, the NCC implemented

procedural changes that were intended to remedy the perception, of certain shipper groups, that there was still unfairness in the classification process.

The newly revised classification system is described in more detail in the accompanying statement of Joel Ringer. As Mr. Ringer explains, the new classification system provides all interested persons a full opportunity to obtain notice and pertinent information at the very early stages of a Classification proceeding. These interested persons have the opportunity to participate in the process and have their views considered initially by a Panel of NCC member carriers. They have the further opportunity for review by a neutral arbitrator or by the full NCC. The procedures for making changes in the Classification are specified in Articles III and IV of the NCC's Section 5a Agreement. Under Article IV proposals may be filed by any person, firm or corporation having an interest in the contents of the Classification, except that no employee or employee committee of the NCC may docket a proposal. The Secretary of the NCC places proposals received by the Committee on the first available docket for hearing.

Article III provides that open public meetings shall be conducted on all pending proposals and that interested persons may participate in the process either individually or collectively through membership associations, institutions, trade organizations or other groups. Any person may become a party of record to a proposal by simply writing to the NCC's Secretary prior to the meeting in which the proposal will be heard. Further, any interested persons, including shippers, receivers, consultants, carriers or practitioners, have the opportunity to file with the Secretary, written representations respecting a docketed proposal or other Classification matter. Those representations are then included in a public docket file which is posted on the NMFTA's website and made available to

the NCC or Classification Panel members or anyone expressing an interest well in advance of the meeting at which the involved Classification matter is to be considered. Upon request, the Secretary will promptly identify the proponent of any proposal or divulge to any person the vote cast by any NCC member on any docketed proposal.

Under Article III of the Agreement, much of the classification work of the NCC is done by four Classification Panels which are comprised of NCC members. These Panels, operating under the same agency approved procedures set forth in the NCC's Agreement, meet regularly four times a year (each Panel meets once a year) to consider and vote on classification matters listed in the docket bulletin. As background information, the Panels consider the reports and information that have been placed on the public record in advance of the Panel meeting by interested persons and by the staff. These reports, which range over the entire spectrum of classification matters are also available for inspection by interested parties prior to the meeting. Based upon their evaluation, the Panel members determine whether the proposed changes to the Classification are necessary or desirable. A Panel's disposition of the proposals before it ranges from adoption to modification to disapproval.

In disposing of a docketed proposal, the Classification Panel may modify the proposal, but may not alter or expand the initial scope of the proposal, as shown in the docket bulletin, without providing for additional public notice. Once the disposition of a proposal is made by the NCC or a Classification Panel, notice is provided to all parties of record and to the NCC. The Secretary of the NCC will instruct the Publishing Agent of the NMFC with regard to the changes to be made in the Classification in accordance with the dispositions issued by the Committee or Classification Panel.

Regardless of the final action on a proposal, the Agreement (Article IV Rule 9) provides all carriers participating in the NMFC with the free and unrestrained right of independent action.

**D. Both the NCC's Section 5a Procedures and the Permissible Content of the NMFC are in Accord with ICC/STB Decisions**

Since the Motor Carrier Act of 1980, the ICC and STB issued a number of decisions bearing directly on the content of the NMFC and the procedures by which it is maintained and amended. For example, in Ex Parte No. MC-98 (Sub-No. 1), Investigation into Motor Carrier Classification,<sup>2</sup> the ICC ordered a number of changes to the NCC's Section 5a Agreement. Each of these changes were intended to further improve the "transparency" or "user-friendliness" of the Classification system and thus serve the public interest in a largely deregulated and market-driven environment. This decision also revised the criteria that are considered in classification-making. The Commission's almost ten-year-long proceeding designated I & S, M - 29788, Shipments Moving on Order Notify Bills of Lading, reviewed the NMFC in detail and identified all items, rules and related provisions which comprised the permissible content of a freight classification. All other provisions were ordered expunged.

In Ex Parte No. 297 (Sub-No. 5), Rate Bureau Investigation, the ICC, as pertinent, prescribed new and exacting requirements governing the operation and procedures of the carriers' collective rate and classification-making operations. These principles were implemented in separate proceedings addressing the agreement of each organization having Reed Bullwinkle antitrust immunity. The classification-making procedures of the

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<sup>2</sup> See Footnote 1, supra.

NCC were examined in detail and necessary changes prescribed in Section 5a Application No. 61 -National Classification Committee Agreement (decisions approving the Agreement were served May 18, 1987 and May 9, 1988). And, as the result of its proceeding designated I&S M --30360, Reclassification Pork Skins and Bacon Rinds, the ICC ordered certain fundamental adjustments in the NCC's procedures to ensure a full and collegial consideration of each proposal by the "classification makers."

As General Counsel and Executive Director to the NMFTA and NCC it has been my obligation to ensure that the NCC's Section 5a Agreement and its operations are conducted in strict conformance with all of these pertinent ICC decisions as well as the recent decisions of the STB and the changes specified in the requirements of Interstate Commerce Act. The NMFTA has taken its obligations to conform strictly with all applicable requirements very seriously.

The NMFTA and NCC have taken all steps necessary to make certain that the procedures followed in the classification-making process are in strict compliance with the law and all applicable regulatory requirements. To ensure compliance, we continuously review our own procedures and the staff is instructed on a regular basis regarding their compliance with the applicable legal requirements. Moreover, as NMFTA's General Counsel and Executive Director I have attended every meeting of the NCC and its Panels, and I monitor every discussion and action to ensure that the procedures and discussions conform to all applicable legal requirements. Until it was abolished the ICC itself monitored every NCC and Panel meeting in order to be certain that the Classification system operated in the public interest and in compliance with all applicable laws and regulations. What has emerged from this thorough and lengthy oversight process is a

system that has been fine-tuned according to precise ICC/STB requirements to respond to the needs of the transportation community in a largely deregulated environment. And the NCC has conducted its operations in strict accord with the ICC/STB's requirements, consistent with the public interest.

**E. The Classification Continues to Serve the Public Interest**

It is important to recognize that participation in the NMFC is strictly voluntary. Clearly, the NMFC could not survive if there were no willing motor carrier participants. As previously explained, under the NCC's collective classification-making agreement, carriers may withdraw from the NMFC at any time they choose (Article VII, Section 2). Further, the carrier participants have the unrestrained right of independent action whereby they may simply opt out of any collectively determined classification provision (Article IV, Rule 9). The vast majority of motor carriers providing common carrier service, and many contract carriers as well, participate in the NMFC for one reason only, because the system continues to work well for them and for their customers. That is the reason the classification system has survived since the advent of motor carrier regulation.

From time to time, opponents of the Classification will surface. For the most part, this is the result of an increase in the class assigned to a product these companies happen to ship. However, when information is received indicating that a product's classification does not group it with other products having comparable transportation characteristics, the NCC has no choice but to adjust the applicable class. The change is necessary for the involved product to be properly grouped with other commodities that are comparable from a transportation standpoint. Such changes allow each commodity to continue to

support its fair share of the transportation burden, thus fulfilling the NCC's obligation of maintaining a reasonable classification.

Most carriers and shippers understand that continued adjustments are needed to maintain the Classification. Only a very small minority of all classification proposals are disputed. As fully explained in the statement of Joel Ringer, the NCC's implementation of the ICC/STB's exacting requirements provides any person who disagrees with a proposed classification a more than ample opportunity to challenge the proposal through the NCC's classification-making process. Moreover, any person having an interest in a classification proposal has notice well in advance of any action by the NCC and advance access to all the information the NCC will consider. Any interested person has the right to make an appearance before the NCC or the Panel that is scheduled to consider the classification matter and, if not satisfied with the initial decision on the proposal, to either request arbitration or, with the agreement of the other parties in opposition, to obtain reconsideration by the full NCC.

If the present freight classification system could not be preserved and updated, carriers and their shipper customers would lose a valuable and pro-competitive catalog of information that reflects the transportability of all products, and the rules and standards governing their movement. Competition is not possible without information and, consequently, depriving the market of the best source of information concerning the transportability of the thousands of commodities which move in commerce would stifle rather than enhance competition.



**F. Congress Has Repeatedly Recognized the Value of the Collective Classification Process**

The United States Congress has repeatedly recognized the value of the Classification to the users and providers of transportation services. For example, twenty five years ago the Congressional Report that accompanied the Motor Carrier Act of 1980, characterized the Classification as a

“useful tool for shippers, receivers and transporters are freight [so] all know what they are talking about, thereby contributing to an efficient and economical transportation system.”[HR No. 96 -1069, 96<sup>th</sup> Cong. 2d.Sess. p.28].

Recognition of the value of classification has continued to the present. In fact, Congress has repeatedly reaffirmed its support for the Classification by specifically authorizing continued antitrust immunity for both interstate and intrastate classification-making in the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), in Section 60 on of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) in the Interstate Commerce Commission Termination Act of 1995 (ICCTA) and in Section 227 of The Motor Carrier Safety Improvement Act of 1999.

While Section 601 of the FAAAA provides a very broad preemption of state economic regulation of trucking, it specifically carved out an exception for four categories or regulation -- including uniform bills of lading, classifications and cargo liability rules. Additionally, in TIRRA, Congress specifically excluded classification, bills of lading and packaging from the broadened exemption authority that was conferred

on the ICC by that legislation (see 49 USC §10505), and it created protections for collectively determined classifications that did not exist previously<sup>3</sup>.

In ICCTA, Congress specifically brought forward antitrust immunity for “classifications” [49 USC §13703(a)(1)], and it “grandfathered” authority for pre-existing Section 5a Agreements [§13703(e)]. ICCTA also provided that while the Board's approval of such agreements shall expire after three years, approval may be renewed if the agreement is resubmitted to the Board by the parties [§13703(d)]. Subsequently the Motor Carrier Safety Improvement Act of 1999 extended the interval for STB approval from three to five years.

Most importantly, ICCTA provided that if the agreement is unchanged, it must be approved unless the Board finds that the renewal is not in the public interest. Pending the Board's consideration of the renewal of an agreement, the parties may continue to operate under the agreement with the protection of antitrust immunity [§§13703 (d) and 13703(a)(6)]. The foregoing clearly reflects congressional recognition of the value of the Classification.

At no time during the consideration of the Motor Carrier Act of 1980, TIRRA, FAAAA, ICCTA, or the Safety Act did the Congress ever consider removing antitrust immunity for the Classification system. Rather, Congress has always found the Classification to be in the public interest.

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<sup>3</sup> For example, in 49 USC §10761, Congress addressed the issue of the use of collectively determined rates and classifications by nonparticipants. The legislation, the essence of which is carried forward by ICCTA [49 USC §13703(g)], prohibited such nonparticipating carriers from collecting their rates.

**G. Preservation of the NCC's Antitrust Immunity Is Absolutely Necessary.**

Congress originally enacted Reed Bullwinkle antitrust immunity to provide the carriers that engage in approved collective classification-making activities with protection from antitrust litigation. The members of the NCC who perform the classification-making function are owners, officers or full-time employees of motor carrier signatories to the NCC's Sec. 5a agreement. They are elected by all of the motor carriers in their respective states that participate in the NMFC. Each NCC member represents his or her constituents in the classification-making process by taking part in the Classification Panels and the NCC meetings that are held several times a year. The motor carriers employing these NCC members must be willing to allow their valued employees to take ten days or more per year from their busy schedules so they can lend their skills, energy, knowledge and effort to benefit the industry in the development and maintenance of the NMFC. Neither NCC members, nor their employer are compensated for the effort or time expended. In fact, the NMFTA reimburses only a portion of the travel expenses incurred.

In view of the foregoing, should the NCC's antitrust immunity be removed or diminished, it would be entirely unreasonable to expect NCC members to continue their service on behalf of the transportation industry, knowing that all or even a portion of their deliberations would be unprotected and may expose them and/or their companies to the risk of antitrust attack. For example, the Reports of the Motor Carrier Ratemaking Study Commission (established by Congress in the Motor Carrier Act of 1980) quoted the Department of Justice's warning that "There is no question that the freight classification

as presently administered ... would be, absent immunity, highly vulnerable to antitrust attack."

Congress has heard testimony from carriers stating plainly that they would never meet collectively to discuss and vote on any classification matters without immunity. The potential for a suit by a variety of possible plaintiffs alleging antitrust violations is simply too great a risk. Members of NMFTA have frankly advised me that they simply would not risk meeting with other carriers on any aspect of motor freight classification without immunity. Carriers are well aware that a defense of an antitrust lawsuit -- even when it might appear to be frivolous -- could entail disastrous financial and operational consequences. Therefore, without the continuation of the NCC immunity, the current classification system could not be continued.

Removal of the immunity from the classification system would not be not in the public interest. Moreover, the public interest will not be served by destroying a classification system which serves thousands of participants and users of the system so effectively and has done so for decades.

#### **H. Maintenance of the NMFC Requires a Collective Effort.**

Since 1936, when the motor carrier classifications that were parent publications to the present NMFC were initially established, the Classification has been substantially revised, changed, and tailored to reflect the transportation characteristics of commodities pertinent to current operations of the motor carriers. The steady evolution of the Classification to meet the needs of motor carriers has resulted from the enormous array of classification proposals handled by the NCC in the last 50 years. During this time, the

NCC has considered over 350 dockets containing more than 15,000 proposals. These docket proceedings addressed the entire spectrum of classification matters including: (1) new or revised descriptions and classes to reflect new or changed commodities; (2) changes in the packaging requirements; (3) additions to, or revisions of, the general rules regarding the applicable requirements of the NMFC; (4) changes to simplify tariff provisions; (5) revised bill of lading terms, conditions and formats; (6) cancellation of obsolete provisions; and (7) changes to ensure the proper application of existing provisions. These proposals were handled in strict accordance with the requirements of law as interpreted and monitored by the ICC/STB. Over many years, this process has "fine-tuned" the Classification to meet the current needs of motor carriers, while giving full consideration to the user needs as expressed by shippers and their representatives.

In order to maintain the NMFC, the NMFTA employs a staff of six freight classification specialists whose functions are to research and analyze the characteristics and packaging of general freight. The efforts of these specialists are supplemented by a staff of twelve additional employees who are engaged in management, tariff publishing, legal and clerical tasks -- all in support of the NMFC. The staff obtains and compiles pertinent information on the characteristics of the countless commodities moving via LTL motor carriers from a variety of sources, including: 1) independent research efforts that the NMFTA staff carries on at the direction of the NCC; 2) submissions by manufactures and shippers of the involved commodities; and 3) reports from carriers participating in the NMFC.

Maintaining the Classification requires a very substantial effort by the NMFTA's member carriers as well, including more than ninety participating carriers who employ

the NCC representatives and their respective staffs. The expenses incurred in this effort would be much greater than small or even medium-size carriers could afford if each of the carriers were to attempt to publish its own motor freight classification covering "general commodities." Indeed, as a practical matter it is apparent that the process whereby the NMFC is developed and maintained must be supported by the thousands of motor carriers and shippers who benefit from the Classification system.

The expenses associated with maintaining a staff of experts and support personnel to amend the Classification are recovered through sales of the Classification and through participation fees that are paid by the motor carrier participants. These fees are equitably assessed according to each of the participating carrier's gross revenues so that no carrier is unduly burdened. In fact, adjustments to the fee schedule are made, when necessary, by a special committee consisting of NMFTA member carriers of all sizes. In this way, the fee schedules fairly reflect the views of the entire spectrum of motor carriers which participate in the NMFC.

While classification activity comparable to that which is conducted by the NCC might be attempted by carriers or other entities on an individual basis, it is doubtful that such a classification system could be successful. As previously indicated, antitrust immunity that has been conferred on the NCC's activities [49 USC §13703 (a)(6)] authorizes the docketing of classification proposals by shippers or shipper associations as well as motor carriers. For practical reasons, shippers and their representatives are active participants in the process. Participation by interested shippers and others that take part in the classification-making process is very important to the success of the Classification system. They provide valuable information on their products at open public meetings

where changes to the Classification are considered. It is doubtful that the shippers would be willing or even able to participate in the classification-making process if it were to be conducted independently by thousands of LTL carriers. Shippers would not be willing to support separate classification efforts conducted on an individual basis by hundreds of competing carriers in a process which would oblige the shippers to make repeated appearances in a variety of locations to provide information on their same products. It is also unlikely that shipper associations would collectively participate in a classification making process that would subject them to the risk of antitrust liability. Consequently, efforts by individual carriers to develop separate classifications would fail for lack of the necessary input from shippers and other carriers. Moreover, it would be difficult for individual carriers to implement necessary classification changes over the opposition of a powerful shipper/customer. Without the collective system, discrimination and preference and cross subsidies would creep into the carriers' independently-made classifications, as shippers with economic clout would simply "muscle in" lower classifications for their products, thus destroying the principal function of freight classification, i.e. "to ensure that each product shall bear its fair share of the transportation burden." A coercive influence of that nature would substantially impair the carrier's ability to keep its ratings current or reflective of the changed transportation characteristics of the articles transported.

Finally, the national standards established by the NMFC serve a variety of purposes that promote commerce and the public interest. For example, no carrier actually serves all points in the United States in single-line service. Rather, much of the freight moving in commerce is transported in joint-line movements in which two or more

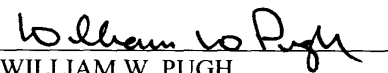
carriers participate. The standards provided by the NMFC enable different combinations of carriers to make arrangements for the transportation of a customer's freight without having to separately reach agreement on the descriptions, classes, rules, packaging and bill of lading terms and conditions that will apply. Clearly, failure to renew the Agreement would cripple this vital joint-line system.

#### CONCLUSION

The NCC seeks renewal of their collective classification-making Agreement. The National Motor Freight Classification serves as a nationwide industry standard that has a proven track record of benefit to the public. That is the only reason why it has survived through these turbulent years of change in the industry, including the repeal of the requirement for motor carriers to file a freight classification with the ICC. What concerns thousands of users of the Classification is the potential for the adverse consequences to the public interest if the collective classification system were to be destroyed by agency decisions that resulted in the reduction or total withdrawal of the antitrust immunity under which the system operates. The destruction of the current valuable, unique and comprehensive and completely voluntary classification system would clearly constitute a disservice to the public interest.

I, William W. Pugh, state under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on March 2, 2005.

  
WILLIAM W. PUGH



**SECTION II**

**STATEMENT OF**

**JOEL L. RINGER**

**II.**  
**STATEMENT OF JOEL L. RINGER**

My name is Joel L. Ringer. I am employed by the National Motor Freight Traffic Association, Inc., as Manager of Classification Development. My business address is 2200 Mill Road, Alexandria, Virginia 22314. I have been employed by NMFTA in various capacities of increasing responsibility—including Chief of the Interpretations Section, Chief of the Research Section and Senior Classification Specialist—since June 1977. I am a graduate of the University of Maryland where I earned a degree of Bachelor of Science with a major in Transportation. I have been Manager of Classification Development since February 2002.

I am familiar with the contents of the National Motor Freight Classification as well as the collective process for maintaining it. Over the years I have provided technical expertise to carriers, shippers and other interested persons in classification-related matters.

**The Nature of Freight Classification**

As stated by the Interstate Commerce Commission:<sup>1</sup>

The primary purpose of a freight classification is to assign each article or groups of articles with comparable transportation characteristics to a class. Assignments are made according to well known classification principles which are based upon distinctions relative to transportability. ...[T]he classification is designed to reflect the characteristics of the commodity transported...

Determining the transportability of a product or group of products is accomplished through an evaluation of the four transportation characteristics prescribed by the Commission:<sup>2</sup>

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<sup>1</sup> Charge For Shipments Moving On Order-Notify Bill Of Lading, N.M.F.T.A., 367 I.C.C. 330, 335 (1983).  
<sup>2</sup> Investigation Into Motor Carrier Classification, 367 I.C.C. 243, 258 and 367 I.C.C. 715-717 (1983).

1. Density;
2. Stowability, which includes excessive weight or excessive length;
3. Ease or difficulty of handling, which includes special care or attention necessary to handle the goods; and
4. Liability, which includes value per pound, susceptibility to theft, liability to damage, perishability, propensity to damage other commodities with which transported and propensity to spontaneous combustion or explosion.

The involved product or product group is then assigned a class reflective of its transportability. There are currently 18 classes in the National Motor Freight Classification, ranging from class 50 (lowest) to 500 (highest).

The National Motor Freight Classification, or NMFC, provides a standard for identifying the thousands of products moving in commerce, and by grouping all products into only 18 classes, greatly simplifies motor carrier pricing. Of course, the NMFC contains no rates or charges. Each carrier establishes its own rates and is free to negotiate with its shipper customers in this regard. Moreover, carriers have the free and unrestrained right of independent action and may deviate from any provision of the NMFC.

The NMFC is more than just commodity descriptions and classes, though. It specifies minimum packaging requirements to ensure that goods are adequately protected in the motor carrier environment and can be handled and stowed in a manner that is reasonably safe and practicable. It also contains various rules that govern and otherwise relate to the classification and/or packaging of articles. As set forth by the Interstate Commerce Commission,<sup>3</sup> there are four categories of rules properly included in the NMFC:

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<sup>3</sup> Charge For Shipments Moving On Order-Notify Bill Of Lading, N.M.F.T.A., supra, at 340.

1. Rules of general tariff application (such as Item 110, Definitions and Explanation of Terms, Punctuation and References);
2. Rules governing assignment of class ratings in normal and extraordinary situations (such as Item 422, Classification of Combined Articles, and Item 640, Mixed Shipments);
3. Rules governing packaging, bill of lading, and related provisions (such as Items 222 through 222-6, Specifications for Fibreboard Boxes, and Item 360, Bills of Lading, Freight Bills and Statements of Charges); and
4. Rules prescribed by the Commission (such as Items 300100 through 300122, Principles and Practices for the Investigation and Disposition of Freight Claims).

#### **The National Classification Committee**

The National Motor Freight Classification is collectively developed and maintained by the National Classification Committee, an autonomous standing committee of the NMFTA. The NCC consists of up to 100 members elected or appointed from the 50 states, the District of Columbia, Canada and Mexico.

The NCC operates with immunity from the antitrust laws. This immunity has been conferred by the United States Congress and is subject to procedures set forth in the NCC's Section 5a Agreement, as approved by the Surface Transportation Board. Members of the NCC are officers, owners and full-time employees of motor carriers who are party to the Committee's Section 5a Agreement.

Shippers cannot serve as NCC members, but they nonetheless have a strong voice in the classification-making process. All classification-making activities of the NCC are given wide, advance publicity. And these activities are conducted at open, public meetings where any interested person, including shippers and shipper groups, can attend and participate. In these sessions, shippers and carriers freely discuss and share

information, views and opinions relating to classification issues.<sup>4</sup> Moreover, all deliberations and decisions of the NCC take place at these meetings in the presence of all in attendance.

#### **The National Classification Committee's Revised Section 5a Agreement**

For the past year the National Classification Committee has operated under procedures approved by the Surface Transportation Board in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, decided December 9, 2003 and served December 10, 2003. The decision was effective December 20, 2003.

While the NCC's procedures have long assured a fair and open process for establishing and maintaining the National Motor Freight Classification, in approving the NCC's revised Section 5a Agreement, the STB sought "to bolster the participation of shippers in the classification process."<sup>5</sup> To this end, significant changes were made to the NCC's procedures, including requiring the NCC "to provide shippers with access to specified additional information at an earlier stage in the classification process" and to allow any party disagreeing with the NCC's disposition of a classification proposal to seek review by a neutral arbitrator.

Implementation of, and strict adherence to, the revised Section 5a Agreement have been top priorities of the NCC and the NMFTA/NCC staff over the past year, necessitating significant operational changes. A copy of the NCC's revised Agreement is appended hereto.

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<sup>4</sup> Interested persons who cannot, or choose not to, attend the public meeting may still participate in the classification-making process by submitting data and/or comments in writing for consideration by the NCC.

<sup>5</sup> Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, decided October 9, 2003 and served October 16, 2003, at page 1.

### **Public Notice and Disclosure**

To facilitate and encourage shipper participation in the classification-making process, the National Classification Committee's revised Section 5a Agreement sets forth a strict notification and disclosure schedule for docketed proposals and classification review matters.<sup>6</sup> Predicated on the time line established by the STB in its decision of November 20, 2001<sup>7</sup>, this schedule requires that all docketed proposals for amending the NMFC as well as all classification review matters be noticed in the NCC's docket bulletin at least 60 days in advance of the open, public meeting where they will be considered.<sup>8</sup>

#### **NCC Docket Bulletin**

In compliance with the revised Agreement, the docket bulletin is mailed to proponents of classification proposals listed therein, to all members of the NCC and to all subscribers to the docket bulletin at least 60 days prior to the meeting.<sup>9</sup> Simultaneously, the docket bulletin is posted on the NMFTA/NCC website for immediate online access by any interested person, free of charge. (The NCC's previous Section 5a Agreement required that the docket be mailed not less than 15 days prior to the meeting.)

In addition to specifying the date, time and location of the public meeting, the docket bulletin contains the full text of each proposal that is scheduled to be considered along with the name, telephone number and e-mail address of the NMFTA/NCC staff member to whom it is assigned, and how to contact the proponent. The relevant staff

<sup>6</sup> See Article III, Section 3(c) of the revised Agreement, attached.

<sup>7</sup> Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, decided and served November 20, 2001, Appendix B.

<sup>8</sup> Article III, Section 3(c)(1)(i) of the revised Agreement.

<sup>9</sup> The revised Agreement allows the docket bulletin, as well as individual notice, to be sent by mail, e-mail or facsimile (fax), but it has been the NCC's practice to have the bulletins and notification letters sent by U. S. first-class or priority mail (depending on the weight of the material).

report (analysis) for each proposal listed in the docket is included in an accompanying appendix, which is likewise posted on the NMFTA/NCC website.<sup>10</sup>

The docket bulletin also lists the classification review matters that are scheduled to be considered at the open, public meeting along with the name, telephone number and e-mail address of the NMFTA/NCC staff member to whom each review matter is assigned.<sup>11</sup> Review matter reports prepared by the staff are not included with the docket bulletin, but in the interest of full disclosure, the NCC does post all of the reports on the NMFTA/NCC website concurrent with the issue of the docket bulletin. This is significant because, while a classification review matter is not a docketed proposal, it might lead to a proposal. And it is the NCC's aim to encourage shipper participation at this very early stage in the classification-making process.

Classification review matters are essentially discussion subjects that are considered by the NCC or one of its Classification Panels at their open, public meetings.<sup>12</sup> They can relate to most any classification issue, such as the class(es) assigned to a particular product or product group, the possible need for clarifying or updating classification description(s), or the possible need to address rules or packaging specifications. Upon consideration of a review matter, the NCC or Panel might vote to initiate, expand or discontinue a research survey; docket a proposal to amend the NMFC,

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<sup>10</sup> The revised Agreement allows for summaries of the staff's reports (analyses) to be included with the docket bulletin, but the NCC has chosen to include the reports themselves with the full and complete staff analysis of each proposal.

<sup>11</sup> Article III, Section 3(c)(1)(i) of the revised Agreement.

<sup>12</sup> Classification Panels are subgroups of the NCC that have the power and duty to consider and act on classification matters. At the discretion of the NCC, up to four Panels of up to 25 Committee members each may be established. The Panels may direct classification research; they may docket classification proposals; and they may hear, consider and act on docketed proposals and other classification matters. The disposition of a docketed proposal by a Classification Panel constitutes the final disposition of the NCC, unless reconsideration by the full NCC is requested pursuant to the revised Agreement.

for consideration at a future open, public meeting; or take no further classification action and remove the matter from consideration.

Echoing the stated goal of the STB, the NCC makes a concerted effort to get shipper participation at the earliest possible stage of the classification-making process. To that end, the NCC posts all staff classification review matter reports on the NMFTA/NCC website concurrent with the issue of the docket bulletin, i.e., at least 60 days prior to the open, public meeting where the review matters are scheduled to be considered, making this information readily available to shippers and other interested persons free of charge.<sup>13</sup>

#### **Individual Notice**

At the same time the docket bulletin is issued, individual notice of docketed proposals and classification review matters is mailed directly to all shippers that participated in any corresponding NCC research as well as to all trade or professional associations identified by the NMFTA/NCC staff as possibly representing shippers who might have an interest.<sup>14</sup> And the NCC also provides individual notice to shippers that have *not* participated in any research activity but have nevertheless been identified as possibly having an interest.

There have been five dockets since the STB's decision approving the NCC's revised Section 5a Agreement became effective: NCC Dockets 2004-1 (February 2004), 2004-2 (May 2004), 2004-3 (August 2004), 2004-4 (November 2004) and 2005-1 (February 2005). The NCC sent out a total of 1,125 individual proposal notifications in

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<sup>13</sup> As explained in the docket bulletin, interested persons who do not have Internet access can obtain copies of the review matter reports from the NMFTA/NCC staff, subject to a charge for copying and transmitting the report(s) requested. However, at this writing no one has made such a request of the staff or indicated that they do not have Internet access.

<sup>14</sup> Article III, Section 3(c)(1)(ii) of the revised Agreement.



connection with these dockets and a total of 4,365 individual review matter notifications, including over 3,840 notifications to shippers that did *not* participate in any NCC research activity. In all, a total of 5,490 individual notifications have been mailed directly to shippers and shipper groups since the STB's decision became effective.

For docketed proposals, the NCC's revised Agreement requires that a copy of the relevant staff report (analysis) be automatically provided, without charge, to anyone who participated in a corresponding research survey.<sup>15</sup> In compliance with this requirement, the NCC mails the docket bulletin and appendix, which includes all proposal reports (analyses), with the notification letters.

To facilitate shipper participation, promote full disclosure and as a courtesy, the NCC also includes a copy of the relevant staff report with its individual review matter notifications to anyone who participated in the corresponding research survey. This is done without request or charge.

#### **Public Docket Files**

As a concomitant to the enhanced notification requirements, the NCC's revised Section 5a Agreement provides shippers and other interested persons substantial access to the NCC's files and the information on which classification changes are based. Specifically, all reports, analyses, studies, work papers, supporting raw data and other information in the NCC's possession relating to each docketed proposal, as well as the full text of the proposed change(s), must be made available in a public docket file.<sup>16</sup>

The public docket files are made available concurrent with the 60-day notice provided in the NCC's docket bulletin and contain the proponent's supporting facts, data

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<sup>15</sup> Article III, Section 3(c)(1)(iii) of the revised Agreement.

<sup>16</sup> Article IV, Rule 4 of the revised Agreement.

and evidence. As the revised Agreement requires<sup>17</sup>, the docket bulletin explains how to obtain, or gain access to, the public docket file for any classification proposal. In this regard, the public files are posted on the NMFTA/NCC website at the same time as the docket bulletin for immediate online access by any interested person, free of charge.<sup>18</sup> And each file is indexed for ease of reference.

The NCC's revised Agreement allows shippers and anyone else interested in a docketed proposal—except the proponent, whose facts, data and evidence must be made available at least 60 days prior to the public meeting—to submit new or additional information no later than 30 days prior to the meeting.<sup>19</sup> And no later than 15 days prior to the meeting anyone can submit a statement or analysis based on the information of record, but no new facts, data or evidence can be accepted or considered.<sup>20</sup> All of this material is added to the public file, indexed and posted on the NMFTA/NCC website.

#### **Operational Changes Resulting From The Revised Section 5a Agreement**

The more severe notification and disclosure requirements of the revised Section 5a Agreement have put additional pressures on the NCC and the NMFTA/NCC staff.

The NCC's docket bulletin must be issued at least 60 days prior to the date of the open, public meeting where the proposals and review matters listed therein will be considered. The NMFTA/NCC staff report (analysis) for each proposal—incorporating the proponent's supporting facts, data and evidence—is included with the docket bulletin, and all of this material is simultaneously made available in the public docket file. The

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<sup>17</sup> Article III, Section 3(c)(1)(i) of the revised Agreement.

<sup>18</sup> Anyone who does not have Internet access can obtain the public docket files from the NMFTA/NCC staff, subject to a charge for copying and transmitting the document(s) requested. However, at this writing no one has made such a request of the staff. Apparently, all interested persons are obtaining this material via the NMFTA/NCC website, free of charge.

<sup>19</sup> Article III, Section 3(c)(2) of the revised Agreement.

<sup>20</sup> Article III, Section 3(c)(3) of the revised Agreement.

relevant staff reports for all of the classification review matters listed in the docket bulletin must be made available at the same time.

To make all of this happen by the 60-day notice date, the NMFTA/NCC staff must do its work well in advance. It takes approximately one week to print the docket bulletin and appendix, which contains all of the staff proposal reports (analyses). So regardless of whether the proponent of a docketed proposal is a shipper, shipper group, carrier, the NCC or one of the NCC's Classification Panels, the relevant staff report (analysis) must be completed at least a week before the issue date of the docket, at the absolute latest. For internal scheduling purposes, staff reports on classification review matters are generally completed even earlier; weeks or even months in advance.

The next open, public meeting where docketed proposals and classification review matters will be considered is the NCC's Classification Panel meeting that is set for May 3, 2005. Notice will be provided in NCC Docket 2005-2, which will be issued on March 3, 2005, 61 days prior to the meeting. The docket went to press on February 25, 2005. All staff proposal reports (analyses) for the docket were completed by February 23. And all review matter reports were completed by February 4, approximately three months before the scheduled meeting. In fact, the staff is already preparing review matter reports for the August 8, 2005 Classification Panel meeting.

This illustrates the lead time necessary to comply with the 60-day notice and disclosure requirements of the NCC's revised Agreement. Of course, all pertinent information relating to the docketed proposals—the aforementioned material as well as any data, analyses or statements that might subsequently be submitted by interested persons—must be included in the respective public docket files.

To handle these added responsibilities and better manage the process, it has been necessary to expand the NMFTA/NCC staff and reorganize staff resources. For instance, in anticipation of the new procedures, an individual was hired to assume primary responsibility for all proposal and review matter notifications as well as the public docket files.

### **Arbitration**

The NCC's previous Section 5a procedures allowed parties dissatisfied with a Classification Panel's action on a docketed proposal to appeal that action to the full National Classification Committee. Certain shipper groups alleged bias in that process. Those allegations were neither proven nor universally accepted by shipper advocates. For instance, Raynard F. (Ray) Bohman, Jr., a nationally known and respected transportation consultant and author who has represented many shippers and shipper groups before the NCC for literally decades, submitted a statement in the previous Section 5a proceeding wherein he stated unequivocally that in his extensive experience he found that the NCC's appeal process "worked well over the years."<sup>21</sup> Regardless, the STB found a *perception* of bias, which in its view discouraged shipper participation. The agency determined that "the best way to provide the necessary assurance of fairness in the... classification process [was] to require the NCC to provide interested parties with an option of review by a neutral arbitrator."<sup>22</sup>

In compliance with that requirement, the NCC's revised Section 5a Agreement includes procedures whereby any party disagreeing with the disposition of a docketed

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<sup>21</sup> See Mr. Bohman's Comments on National Classification Committee's Proposed Modifications to Its Section 5a Agreement No. 61, dated May 17, 2002.

<sup>22</sup> Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, decided and served November 20, 2001, at page 19.

proposal by a Classification Panel or the full NCC may seek arbitration.<sup>23</sup> Transportation Arbitration and Mediation, P.L.L.C., of Washington, DC, has been selected by the NCC to manage the arbitration process. The NCC's revised Agreement requires that a list of at least 10 neutral arbitrators be posted on the NMFTA/NCC website. At this writing, a list of 20 available arbitrators is posted on the website. The list is appended hereto.

As mentioned earlier in this statement, there have been five NCC dockets since the STB's decision approving the revised Section 5a Agreement became effective. A total of 85 proposals have been considered and acted upon by the NCC and its Classification Panels. Arbitration was not sought in connection with any of these proposals. Shippers and shipper representatives that participated in one particular proposal, and expressed their displeasure with the classification action taken, pointedly eschewed the arbitration process for reasons not made known.

If all parties objecting to the disposition of a docketed proposal agree, they can seek reconsideration by the full NCC. This procedure is similar to the old appeal process and is available as an *alternative* to arbitration.<sup>24</sup> This avenue of recourse was approved by the STB in response to the aforementioned comments of Ray Bohman.<sup>25</sup> Since the STB's decision approving the revised Section 5a Agreement became effective, one party—a shipper association—has requested reconsideration. However, that party subsequently decided to withdraw its request, opting instead to do more research on the products involved with the stated intent of coming back to the NCC with a new classification proposal.

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<sup>23</sup> Article V of the revised Agreement.

<sup>24</sup> Article V, Rule 9, of the revised Agreement.

<sup>25</sup> Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, decided March 21, 2003 and served March 27, 2003, at page 12.

We certainly cannot say that everyone has fully agreed with every classification action of the NCC and its Classification Panels. But the absence of requests for arbitration or reconsideration would suggest that the NCC and Panels have acted consistently within accepted classification principles. Significantly, too, no one has challenged any classification action to the STB via protest or complaint.

**Antitrust Immunity Must Be Preserved For the Entire NMFC**

It has been suggested by some that antitrust immunity is not needed for maintaining the National Motor Freight Classification, or at least certain components of it, such as packaging and rules. These suggestions fail to recognize that the various components of the NMFC—the commodity classifications, the packaging provisions and the rules—do not exist in a vacuum. All are interrelated.

The rules govern the application of the individual commodity classifications and provide packaging definitions and specifications. The packaging of a product can bear directly on the product's density, stowing, handling and liability characteristics, and therefore, many class assignments are based on packaging. Eliminating antitrust immunity on any component would impede the NCC's ability to maintain the NMFC.

The effect of packaging, or lack thereof, on the transportability of a product was recognized by the Interstate Commerce Commission. In 1981, the ICC rejected a full-scale density classification for sprayers because, among other reasons, the proposed density provisions did not take into account the different types of sprayers involved, their packaging and their respective stowing and handling characteristics.<sup>26</sup> The ICC noted, for instance, that "...the lightest density sprayers are tendered for transportation in

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<sup>26</sup> I. & S. Docket No. M-30292, Increased Classification Ratings on Sprayers, N.M.F.T.A., decided June 26, 1981.

rectangular packages which offer the optimum in stowability. On the other hand, the larger—and most dense—machine-type sprayers are tendered loose, which, in view of their irregular shapes, must mean that their stowability is at the lower end of the scale.”

A later proposal did take these issues into account. Subject 36 of Docket 865 (July 1986) proposed to reclassify agricultural and industrial sprayers—what the ICC referred to as “machine-type sprayers.” Classes based on packaging and density were proposed in recognition of the varying stowing and handling characteristics, as well as the wide range of densities exhibited. For comparable densities, lower classes were proposed for those sprayers packaged in boxes or crates than those shipped other than in boxes or crates in view of the former’s more-favorable stowing and handling characteristics. The proposal was approved (with modifications to the description), and the provisions—item 177680—have been in effect since October 1986.

If antitrust immunity with respect to packaging were lost, the NCC’s ability to collectively consider such packaging-based classifications would be jeopardized.

Classification rules can have a direct impact on the assignment of classes, too. Item 171, the so-called bumping rule, provides an example. Many density-based classifications in the NMFC reference Item 171, which allows shippers to obtain a lower class by declaring a density higher than the actual density. The shipper, at its option, can increase the weight of the package(s) tendered to increase the density to the minimum provided in the next higher density group, which assigns a lower class. The higher weight is charged, but subject to the lower class.

Bumping is attractive to shippers because it provides a mechanism for reducing transportation costs. In fact, Item 171 stipulates that bumping is done only when it results in a lower freight charge.

Antitrust immunity clears the way for the NCC to collectively consider proposals involving commodity classifications that may include a reference to Item 171.

**The National Classification Committee Has Fully Complied  
With Its Revised Agreement**

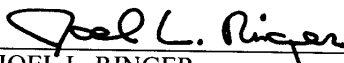
The NCC's revised Section 5a Agreement followed a comprehensive review by the Surface Transportation Board over a period of six years. The STB required changes to the NCC's procedures to ensure further "transparency" in the classification-making process and thereby encourage shipper participation. As demonstrated herein, the NCC has fully implemented and strictly adhered to its revised Agreement.

The revised procedures have been in effect for only one year. That limited experience has not provided an adequate time frame to determine whether the prescribed revisions have fully accomplished their intent. Indeed, the arbitration process—deemed crucial by certain shipper groups to assure impartial classification decisions and eliminate even the perception of bias—has not as yet been used.

Accordingly, it is submitted there is no basis at this time for any further changes to the NCC's Section 5a Agreement.

I, Joel L. Ringer, state under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on March 2, 2005.

  
JOEL L. RINGER



**ATTACHMENT A**

**AGREEMENT**

**As Amended**

**DECEMBER 20, 2003**

**RELATING TO**

**PROCEDURES FOR**

**COLLECTIVELY ESTABLISHING AND**

**MAINTAINING THE PROVISIONS OF THE**

**NATIONAL MOTOR FREIGHT CLASSIFICATION**

**By The**

**NATIONAL CLASSIFICATION COMMITTEE**

## **PREAMBLE**

The undersigned motor carrier in consideration of the covenants of the other motor carriers of property signatory to this Agreement agrees that it will participate in the collective initiation, consideration and change of classifications and rules governing the transportation of property in interstate or foreign commerce in accordance with the terms of this Agreement.

The undersigned carrier and every other carrier party to this Agreement may exercise the free and unrestrained right to take independent action at any time with respect to any of the matters contained herein.

The undersigned carrier appoints the Secretary of the National Classification Committee as its agent and attorney-in-fact to sign, file and pursue in its name before the United States Surface Transportation Board (Surface Transportation Board) such application(s) as may be required for the authorization or reauthorization of this Agreement, and to take any other appropriate action in connection therewith.

## **ARTICLE I - PURPOSE AND SCOPE**

This Agreement pertains to the collective initiation, consideration and handling of motor freight classification matters and for the organization, powers and procedures of a committee of up to one hundred representatives of the motor carriers party to this Agreement to be known as the National Classification Committee (hereinafter called the Committee).

## **ARTICLE II - ORGANIZATION OF THE NATIONAL CLASSIFICATION COMMITTEE**

### **Section 1. National Classification Committee**

The Committee shall consist of up to one hundred members, to be elected from the fifty states, the District of Columbia, Canada and Mexico (hereinafter called jurisdiction(s)). The number of members to be elected from each jurisdiction shall be determined by the Secretary of the Committee, in accordance with the classification participation fees received from each of the jurisdictions during the previous fiscal year.

### **Section 2. Voting Rights**

Each party to this Agreement shall be entitled to one vote for each Committee member to be elected from the jurisdiction in which its principal place of business is located. A carrier entitled to vote for more than one nominee may, if it so elects, cast all of the votes to which it is entitled in favor of one nominee, or it may cast one or more votes for each of one or more nominees.

## **ARTICLE II - ORGANIZATION OF THE NATIONAL CLASSIFICATION COMMITTEE**

### **Section 3. Nominations**

(a) The Committee shall be reconstituted on July 1 of each year. Any officer, owner or full-time employee of a motor carrier party to this Agreement shall be eligible for membership on the Committee, except that no member of the Committee who is serving a consecutive term and who has not attended one of the three regular meetings next preceding the issuing of ballots as provided in Section 4 hereof, shall be eligible for re-election.

(b) Any party to the Agreement may nominate one qualified person for election from the jurisdiction in which such nominator is domiciled. The Secretary of the Committee shall request nominations from all parties not later than April 1 of each year. Nominations must be made in writing to the Secretary not later than May 1.

### **Section 4. Elections**

By June 1 of each year, the Secretary of the Committee shall issue by mail or electronic means to each party to this Agreement a ballot listing all nominees in its jurisdiction. Each party desiring to vote shall return its ballot to the Secretary of the Committee not later than June 25. The Secretary of the Committee and two witnesses shall count the votes and certify the results to the Chairman of the Committee. In the event of a tie vote, the Secretary shall take a second ballot in the jurisdiction in which the tie occurs, and balloting shall continue until the tie is broken.

### **Section 5. Officers**

At its first meeting subsequent to the annual election, the Committee shall organize by electing a Chairman, a First Vice Chairman and a Second Vice Chairman; and by selecting the Secretary of the Committee, who shall have no vote and need not be a member of the Committee.

### **Section 6. Classification Panels**

Classification Panels are subgroups of the Committee that have the power and duty to consider and act on classification matters. At the discretion of the Committee, the Chairman may establish up to four Panels of up to 25 Committee members each. Panel members and a Chairman and Vice Chairman of each Panel shall be appointed as necessary by the Chairman of the Committee. The Secretary of the Committee shall act as the Secretary of each Panel. Members of the Classification Panels shall serve until their successors have been appointed. No Committee member shall be obliged to serve on a Panel.

### **Section 7. Subcommittees**

The Chairman of the Committee may, and at the discretion of the Committee shall, appoint such subcommittees as are required to conduct the work of the Committee.

## **ARTICLE II - ORGANIZATION OF THE NATIONAL CLASSIFICATION COMMITTEE**

### **Section 8. Vacancies and Tenure of Office**

The Chairman of the Committee shall have the authority to fill any vacancy on the Committee by appointment. All members shall serve until their successors are elected or appointed and have signified a willingness to serve. The Chairman, Vice Chairmen and Secretary of the Committee shall serve for terms beginning with election to office and continuing until the next succeeding Committee shall have elected new officers. In the event a vacancy occurs in the office of Chairman, through resignation or otherwise, the First Vice Chairman shall succeed to that post, and the Second Vice Chairman shall succeed to the post of First Vice Chairman.

## **ARTICLE III - NATIONAL CLASSIFICATION COMMITTEE - POWERS, DUTIES AND PROCEDURES**

### **Section 1. Powers and Duties of the Committee**

The Committee shall have the power and duty to:

(a) Investigate and consider matters affecting the classification of commodities, initiate proposals for changes in the National Motor Freight Classification (hereinafter called the Classification), and determine and prescribe the descriptions of articles, classes, rules, packaging requirements and specifications, bill of lading formats, other provisions and the context of the Classification; provided, however, that any participating carrier shall have the free and unrestrained right to establish, or concur in, exceptions to the Classification;

(b) Establish the procedures under which the Classification Panels shall operate, and direct and monitor the staff in its performance of analytical and support services;

(c) Upon request, make the staff available, on a direct-cost reimbursement basis, to assist shippers in conducting research on classification matters and to report the results to the Committee when the research reveals that a classification change may be warranted;

(d) Upon request, make the staff available to assist shippers in making appropriate proposals for classification changes;

(e) Establish the procedures under which proposals for new or changed descriptions of articles, classes, rules, packaging requirements and specifications, bill of lading formats and other provisions of the Classification shall be initiated, heard and decided;

(f) Upon request, make the Committee's Synopsis of Classification Opinions available to any interested person, to the same extent, on the same terms and at the same charge that it is made available to the Committee's member carriers;

## **ARTICLE III - NATIONAL CLASSIFICATION COMMITTEE - POWERS, DUTIES AND PROCEDURES**

### **Section 1. Powers and Duties of the Committee – concluded**

(g) Establish reasonable terms and conditions under which entities may become participants in the Classification, and any entity may become a participant therein upon complying with such terms and conditions.

### **Section 2. Powers and Duties of Classification Panels**

(a) At the direction of the Committee, Classification Panels may:

- (1) Direct research regarding commodities and any classification proposal or provision;
- (2) Docket proposals for changes in the Classification;
- (3) Hear, consider and act on docketed proposals and other classification matters.

(b) In acting on a docketed proposal, a Classification Panel may: (1) approve the proposal as docketed; (2) disapprove the proposal as docketed; (3) modify and approve the proposal; or (4) at its discretion defer disposition to the next Classification Panel.

(c) The disposition of a docketed proposal by a Classification Panel shall be the final disposition of the Committee, unless reconsideration by the full Committee, rather than arbitration, is requested of a Classification Panel decision and is agreed to by all parties to the classification proposal.

### **Section 3. Conduct of Business by the Committee or a Classification Panel**

(a) The Committee and/or a Classification Panel shall conduct business at meetings which shall be held at least three times a year at times and places and in formats to be designated and noticed by the Secretary of the Committee not less than sixty (60) days in advance. Special meetings to consider matters other than docketed proposals may be called by the Secretary, and shall be called by the Secretary at the request of fifteen or more members, on not less than twenty (20) days' written notice.

(b) At meetings of the Committee or a Classification Panel each member shall have one vote. A majority vote of the members present at a meeting shall govern the Committee's or Classification Panel's action. At all meetings the presence of 30% of the total membership of the Committee or Classification Panel shall be necessary to transact business. Meetings shall be governed by Robert's Rules of Order. Formal minutes of all meetings and a record of the maker and seconder of every motion respecting a docketed proposal and the vote of all members thereon shall be maintained.

**ARTICLE III - NATIONAL CLASSIFICATION COMMITTEE - POWERS, DUTIES AND PROCEDURES**

**Section 3. Conduct of Business by the Committee or a Classification Panel – continued**

**(c) Notice and Disclosure required prior to a meeting of the Committee or Classification Panel**

**(1) Not less than sixty (60) days prior to a Committee or Classification Panel meeting:**

(i) The full text of the Committee's Docket Bulletin shall be posted on the National Motor Freight Traffic Association's website and simultaneously provided by mail, e-mail or facsimile to proponents of docketed proposals scheduled to be considered at the meeting, to all members of the Committee or Panel, as the case may be, and to each subscriber to the Docket Bulletin. The notice provided in the Docket Bulletin shall specify the time, date and place of the meeting, and shall contain the full text of each proposed change along with the relevant staff report (analysis), or a summary thereof, and specify how to contact the staff member assigned to the proposal, how to contact the proponent(s) of the proposal and how to obtain the raw data and any other information in the Committee's public docket file. The Docket Bulletin shall also list classification review matters to be considered at the meeting, including how to contact the staff member assigned and how to obtain a copy of the relevant staff report.

(ii) Individual notice shall be provided by mail, e-mail or facsimile to all shippers that participated in any Committee research activities leading to docketed proposals or other classification matters to be considered at the meeting. Individual notice shall likewise be provided to all trade and professional associations that have been identified by staff as representing shippers of the involved product(s). Individual notice shall specify the time, date and place of the meeting, the National Motor Freight Traffic Association's website address for online access to the Docket Bulletin and instructions for obtaining access to the Committee's public files.

(iii) The Committee, without request and free of charge, shall provide copies of any reports (analyses) prepared by the staff concerning a docketed proposal to any party that has participated in the corresponding research study.

**(2) No later than thirty (30) days prior to the public meeting,** interested parties may submit statements, including any underlying studies, work papers, supporting raw data and any other information, relating to a docketed proposal to the Secretary of the Committee.

**(3) After thirty (30) days but no later than fifteen (15) days prior to the public meeting,** the Committee and any interested party may submit a statement or analysis regarding the information of record, but no new facts, data or evidence will be accepted or considered. The Committee shall include this material in the public docket file.

**ARTICLE III - NATIONAL CLASSIFICATION COMMITTEE - POWERS, DUTIES AND PROCEDURES**

**Section 3. Conduct of Business by the Committee or a Classification Panel – concluded**

**(c) Notice and Disclosure required prior to a meeting of the Committee or Classification Panel**

(4) The Secretary of the Committee shall forward all information of record to the Committee or Classification Panel members, as the case may be, prior to the meeting at which a docketed proposal is to be considered.

(d) Any interested person may file with the Secretary of the Committee written representations respecting any docketed proposal or other classification matter in electronic or paper format. Written representations relating to a docketed proposal will be included in the Committee's public docket file. Such public files will be posted on the National Motor Freight Traffic Association's website, and written representations submitted in paper format will be electronically scanned for inclusion in the files. To ensure that the highest quality image is captured during the scanning process, all letters, statements, data sheets and other written representations submitted in paper format must be typed on 8½ by 11-inch white paper, with type no smaller than 12 point.

(e) Any person interested in a docketed proposal or other classification matter shall, upon request to the Secretary of the Committee, be allotted a reasonable amount of time, as determined by the Secretary, for an appearance before the Committee or Classification Panel, as the case may be.

(f) In considering a docketed proposal, the Committee or Classification Panel will be guided exclusively by:

(1) The public record consisting of all material in the public docket file that has been established by the process set forth in this Agreement;

(2) The applicable regulatory and legal standards and precedent establishing the reasonableness of classification provisions;

(3) Principles of procedural fairness as set forth in this Agreement and the arguments of the parties based on the public file; and

(4) The Committee's policies and guidelines of record contained in the public file.

(g) Upon request, the Secretary promptly shall divulge to any person the vote cast by each member of the Committee or a Classification Panel on any docketed proposal.



### **ARTICLE III - NATIONAL CLASSIFICATION COMMITTEE - POWERS, DUTIES AND PROCEDURES**

#### **Section 4. Subcommittee Meetings**

Meetings of any subcommittees shall be held on call of the Chairman of such subcommittee. The members present at any meeting shall constitute a quorum and all meetings shall be governed by Robert's Rules of Order; except that any part of a meeting of a subcommittee during which proposals for new or changed provisions in the Classification may be developed shall be noticed as provided in Section 3(c) and will be subject to the quorum, open meeting and any other applicable procedural requirements established in the Agreement for the collective consideration of classification matters by the Committee and Classification Panels. Any person interested in such classification matters may attend the meeting, and all persons in attendance may participate in discussions.

### **ARTICLE IV – RULES OF PROCEDURE FOR CHANGES IN THE NATIONAL MOTOR FREIGHT CLASSIFICATION**

#### **Rule 1. Proposal Forms**

The Committee shall provide a suitable form for the submission of proposals for changes in the provisions of the National Motor Freight Classification.

#### **Rule 2. Proposals**

(a) All proposals to establish new or changed descriptions of articles, classes, rules, packaging requirements and specifications, bill of lading formats or other provisions of the Classification, shall be filed in writing with the Secretary of the Committee. The staff will provide assistance in the formulation or preparation of such proposals, as may be requested. Proposals may be filed by the Committee, a Classification Panel or any other person, firm, corporation or group having an interest in the contents of the Classification; provided, however, that no employee or employee committee of the Committee may docket or act on any proposal.

(b) Each classification proposal shall be docketed. A Docket Bulletin describing such proposals shall be published by the Secretary and posted on the National Motor Freight Traffic Association's website. Docket Bulletins shall be simultaneously provided by mail, e-mail or facsimile to proponents, to all members of the Committee and to all subscribers to the Docket Bulletin.

(c) Upon request, the name of the proponent of a proposal shall be promptly divulged to any person. In the case of a proposal docketed by the Committee or a Classification Panel, the member moving to docket, the member seconding the motion and a tally of the votes promptly will be divulged.

#### **Rule 3. Docketing and Parties of Record**

(a) The Secretary of the Committee shall place proposals on the first available docket for public hearing.

(b) Any person may become a party of record to a docketed proposal by communicating an interest in writing to the Secretary prior to the public meeting at which the proposal will be considered.

## **ARTICLE IV – RULES OF PROCEDURE FOR CHANGES IN THE NATIONAL MOTOR FREIGHT CLASSIFICATION**

### **Rule 4. Public Docket Files**

(a) Copies of all reports, analyses, studies, work papers, supporting raw data and other information in the Committee's possession relating to a docketed proposal, along with the full text of the proposed change, shall be made available in a public file, subject to any protective orders that may be obtained from the Surface Transportation Board. Protective orders notwithstanding, the public docket file will not name the entity that provided the raw data, nor will it include information that could lead to the name of the entity that provided the raw data. The source of the raw data will be identified as "shipper/receiver," "carrier," or the like.

(b) Any interested person may obtain the Committee's public file on any docketed proposal by submitting a request in writing by mail, by e-mail or by facsimile to the Committee. The request must specify the Committee's docket and subject numbers, the material(s) sought, and whether the material(s) is to be furnished by mail or e-mail or made available for courier pick-up. The material(s) will be mailed, e-mailed or made available for courier pick-up no later than two (2) business days after the request is received. If the request is received before the docket record is closed, the material(s) will be furnished as of the date the request is received. After the docket record is closed, any material(s) added to the public file subsequent to the date of the request will be furnished, as per the requesting party's instructions, within two (2) business days. A reasonable charge, not to exceed the Committee's cost for copying and transmittal, will be assessed for these services.

(c) The Committee will also post the public docket files on the National Motor Freight Traffic Association's website, organized by docket and subject numbers, each file including an index of documents. Material received after the initial posting of a public docket file will be posted on the website within two (2) business days after the deadline for receiving the material.

(d) The Committee's public docket files will be retained at the Committee's offices for a period of at least five (5) years. Public files posted on the National Motor Freight Traffic Association's website will be retained there until final disposition, including any arbitration proceeding or proceedings before the Surface Transportation Board.

### **Rule 5. Public Meetings**

Meetings open to the public shall be conducted by the Committee or a Classification Panel, as the case may be, on all docketed proposals and on all other classification matters, and by subcommittees when considering matters pertaining to changes in the Classification. At public meetings any person may participate by presenting views orally and/or in writing on any classification matter under consideration; however, facts, data or evidence relating to docketed proposals received less than thirty (30) days prior to the meeting will not be accepted or considered. Note-taking and/or sound recordings are permitted at these public meetings provided that the meeting is not disrupted by such activities.

## **ARTICLE IV -- RULES OF PROCEDURE FOR CHANGES IN THE NATIONAL MOTOR FREIGHT CLASSIFICATION**

### **Rule 6. Disposition of Proposals**

(a) Disposition of docketed proposals shall be made by the 120<sup>th</sup> day after docketing, unless reconsideration by the full Committee is requested of a Committee or Classification Panel decision by all parties to that classification proposal.

(b) In disposing of a docketed proposal, the Committee or a Classification Panel may modify the proposal, but it may not broaden the scope of the proposal as shown in the Docket Bulletin.

(c) Members may not discuss or vote on provisions governed by Section 14706 (c)(1)(C) of Title 49 of the United States Code.

### **Rule 7. Changes Without Docketing**

Changes in the Classification made necessary by law or by order of a regulatory body or for clarification, may be made without docketing or observance of the procedures herein. Notice of such changes shall be provided in the Docket Bulletin and posted on the National Motor Freight Traffic Association's website.

### **Rule 8. Notice and Publication**

(a) Notice of Committee and Classification Panel dispositions of docketed proposals shall be provided by mail, e-mail or facsimile to the proponents, parties of record, members of the Committee, subscribers to the Docket Bulletin and any parties that have submitted written requests for such notice. Information on all classification actions will be posted on the National Motor Freight Traffic Association's website.

(b) The Secretary of the Committee shall instruct the Publishing Agent of the Classification of changes to be made in the Classification in accordance with the disposition of proposals.

### **Rule 9. Independent Action**

(a) The Committee may not interfere with a carrier's free and unrestrained right of independent action.

(b) Proposals for independent action will not be discussed by the Committee or by any Classification Panel. Any expert analysis or technical assistance provided by employees or employee committees concerning any independent action proposal shall be kept confidential.

## **ARTICLE V – ARBITRATION**

Should any party disagree with the disposition of a docketed proposal by the Committee or a Classification Panel, arbitration may be sought by that party subject to the following rules of procedure.

### **Rule 1. Request for Arbitration**

The party seeking relief shall be referred to as the claimant and the National Classification Committee (Committee) shall be referred to as the respondent. Within thirty (30) days of a classification decision by the Committee or a Classification Panel, claimant(s) shall notify the Secretary of the Committee by mail, telephone, e-mail or facsimile that arbitration is requested of the Committee or Classification Panel action on the docketed proposal.

### **Rule 2. Selection of Arbitrator**

(a) The Secretary of the Committee shall post on the National Motor Freight Traffic Association's website a list of not less than ten (10) neutral arbitrators selected by an independent arbitration association. If a person does not have Internet capability, upon notice by that party that it wishes to seek arbitration, the Secretary, within two (2) business days after that notice, will provide the list of not less than ten (10) neutral arbitrators by express mail, e-mail or facsimile. The claimant(s) and the Secretary of the Committee shall confer by telephone, e-mail or facsimile within three (3) business days after the list of neutral arbitrators has been received by the claimant(s) or was available to the claimant(s) on the National Motor Freight Traffic Association's website to mutually agree to a neutral arbitrator. If the claimant(s) and the Secretary select different neutral arbitrators, and cannot agree on a single neutral arbitrator, they will so notify the arbitration association, and the two selected arbitrators will choose the arbitrator to handle the matter from the remaining arbitrators on the list who were not selected. The arbitration association shall be notified by telephone, e-mail or facsimile of the selection of the neutral arbitrator, and the arbitration association shall determine whether the selected neutral arbitrator has a conflict of interest. The claimant(s) and the Secretary of the Committee shall be notified promptly of the results of that inquiry. If the neutral arbitrator selected has a conflict of interest, the two originally selected arbitrators will choose another neutral arbitrator until no conflict of interest exists.

(b) The list of neutral arbitrators will be utilized unless, within seven (7) business days after notice of arbitration is provided by a claimant, the parties mutually agree to utilize a neutral arbitrator not identified on the list.

### **Rule 3. Commencing The Arbitration Process**

Prior to the commencement of the review by the neutral arbitrator, claimant(s) and the Committee will be required to execute an arbitration agreement. Upon receipt of the signed arbitration agreement, the arbitration association shall direct the selected neutral arbitrator to commence the proceeding. The claimant(s) and the Committee will share equally in the fees charged for the arbitration process by the arbitration association, except that each will bear their own legal or representation fees and administrative costs.

## **ARTICLE V – ARBITRATION**

### **Rule 4. Transmittal of Public Record**

Within one (1) business day after the notice of the selection of a neutral arbitrator, the Secretary of the Committee shall forward by express mail a complete copy of the public record developed during the course of the handling of the docketed proposal before the Committee or a Classification Panel to the arbitrator, and concurrently, a copy (copies) by express mail to the claimant(s).

### **Rule 5. Parties' Statements of Position**

Within seven (7) business days after the notice of the selection of a neutral arbitrator, the claimant(s) may submit to the arbitrator a statement of position as to why the initial classification action by the Committee or a Classification Panel is not in conformity with established classification standards. A copy of the statement shall be provided by express mail, e-mail or facsimile to the Secretary of the Committee. Within ten (10) business days after the receipt of claimant's(s') statement(s) the Committee may submit a response by express mail, e-mail or facsimile to the arbitrator, and send a copy by express mail, e-mail or facsimile to the claimant(s). At the arbitrator's discretion, rebuttal statement(s) may be submitted by the claimant(s) by express mail, e-mail or facsimile within five (5) business days after receipt of the Committee's reply. A copy of the rebuttal(s) must be served contemporaneously by express mail, e-mail or facsimile on the Secretary of the Committee.

### **Rule 6. Decision of Arbitrator**

Within thirty (30) days after the receipt of the parties' statements of position, the arbitrator shall issue a written decision determining whether or not to affirm the challenged classification action. The arbitrator's decision will consider statements on appeal submitted by the parties, but such statements must not include inappropriate evidence and issues and must not seek or constitute a *de novo* review. The arbitrator's conclusions shall be governed by the established regulatory and legal standards and precedent for evaluating the reasonableness of classification provisions. The reasonableness of the class(es) proposed for any commodity shall be determined exclusively by comparison of that commodity's four recognized transportation characteristics (density, stowability, handling and liability, as defined by the Interstate Commerce Commission in Ex Parte No. MC-98 (Sub-No. 1), Investigation Into Motor Carrier Classification, 367 I.C.C. 243 (1983) and related cases) with the transportation characteristics of other commodities that are assigned a comparable class(es). The decision will set forth the essential reasoning that was relied upon in reaching these conclusions. The arbitrator's decision shall be final, subject only to review by complaint or by a timely filed petition for suspension with the Surface Transportation Board. The Committee may publish any classification action found reasonable by the arbitrator to become effective not less than fifteen (15) days after the arbitrator publishes his or her decision.

## **ARTICLE V – ARBITRATION**

### **Rule 7. Challenge of Classification Decision If Arbitration Is Not Sought**

If arbitration is not sought within thirty (30) days after the classification decision on a proposal is made by the Committee or a Classification Panel, the approved changes may be published to take effect on not less than fifteen (15) days' notice. Should the classification change be protested before the scheduled effective date, in accord with the Surface Transportation Board's procedures, the protest and any reply by the Committee shall be based on the public record upon which the Committee's or Classification Panel's action was based, unless the party(ies) protesting the classification action establishes that the Committee failed to give notice of the docketed proposal as required by its approved classification procedures.

### **Rule 8. Challenge of the Arbitrator's Decision**

If a classification decision by the Committee or a Classification Panel is the subject of an arbitration proceeding, the classification decision, if affirmed by the arbitrator, may be taken to the Surface Transportation Board either by complaint or by a timely filed petition for suspension of any affirmed classification changes.

### **Rule 9. Alternative to Arbitration**

If all of the parties objecting to an initial classification decision by the Committee or a Classification Panel agree to seek reconsideration of the classification action by the full Committee, that request must be made within thirty (30) days of the initial classification decision to the Secretary of the Committee by mail, e-mail or facsimile. A majority of the Committee present shall decide whether the reconsidered classification decision shall be approved or disapproved. The reconsideration process may require that final disposition of the classification proposal extend beyond the 120<sup>th</sup> day after docketing. After reconsideration, dissatisfied persons may file petitions for suspension of the reconsidered classification proposal with the Surface Transportation Board.

## **ARTICLE VI - AMENDMENTS**

### **Section 1. Committee Action**

This Agreement may be amended or revised at any regular or special meeting of the Committee by a two-thirds majority vote of the members present, a quorum being present and voting, provided that thirty (30) days' notice in writing of the proposed amendment shall have been provided by mail, e-mail or facsimile to all members of the Committee. Such notice shall set forth the exact language of the proposed amendment, but the Committee shall be empowered to change or modify such language so long as the amendment as finally adopted is within the scope and purpose of the proposed amendment of which notice was given.

### **Section 2. Referendum**

Any three members of the Committee or any group of twenty-five or more parties to this Agreement by writing addressed to the Secretary within forty (40) days after the date of such amendment may request the Secretary to submit such amendments to a referendum mail vote to all persons then parties to this Agreement. Upon this demand being made, the Secretary shall submit such amendment to such referendum within thirty (30) days after such request and call for written and signed ballots with respect thereto to be filed with the Secretary within fifteen (15) days thereafter. Such amendment shall be deemed to be disapproved and shall be of no force or effect, if upon such referendum a majority of the then parties to this Agreement shall vote that such amendment be disapproved or rejected.

### **Section 3. Effective Date**

No amendments to this Agreement shall become effective until submitted to, and approved by, the Surface Transportation Board.

### **Section 4. Force and Effect**

An amendment adopted and approved as herein provided unless subsequently disapproved by referendum shall become a part of this Agreement with like force and effect as if it had been originally incorporated herein and shall be binding upon all parties to this Agreement.

## **ARTICLE VII - TERMS AND PARTIES**

### **Section 1. Duration**

The term of this Agreement shall be for a period of one (1) year and thereafter until terminated, as it may be at any regular or special meeting of the Committee by a two-thirds vote of the members of the Committee present and voting, or by a majority of the entire Committee, provided written notice of such proposed termination shall have been mailed to all members of the Committee at least thirty (30) days prior to the meeting at which the same is to be considered.

### **Section 2. Voluntary Withdrawal**

Any party to this Agreement may withdraw therefrom upon not less than sixty (60) days' notice in writing to the Secretary of the Committee.

### **Section 3. Involuntary Withdrawal**

Any party to this Agreement who for any reason whatsoever shall cease to be a motor carrier of property or a participant in the Classification shall cease to be a party hereto upon the date of such cessation.

### **Section 4. Readmission**

Any party to this Agreement who has withdrawn voluntarily or involuntarily may again become a party hereto by making a request in writing, provided such party is, upon the date of such request, a motor carrier of property and a participant in the Classification.



**IN TESTIMONY WHEREOF**, the parties hereto have set their hands and seals as of this

..... day of....., 20.....

Carrier .....

By .....

Title .....

Date .....

Trade Name (if any) .....

Business Address (Main Office) .....

**NumberStreet**

City County State Zip Code

Type of Organization .....

..... (Individual, partnership or corporation)

If a corporation:

State in which organized .....

Date of incorporation .....

If a partnership:

Date of formation of partnership .....

Names of all partners .....

Type of carrier .....

Certificates: MC No. .... US DOT No. ....

**ATTACHMENT B**

**ATTACHMENT B**

2200 Mill Road  
Alexandria, VA 22314  
703.838.1810

Classification	Participation	Packaging	Workshops	Meetings	Contact Us	Links	Home
NEW NCC Agreement			Public Docket Files		Arbitration		

**Arbitration**

Any party to a docketed proposal who disagrees with the disposition of that proposal by the National Classification Committee or a Classification Panel may seek arbitration. Or as an alternative, they may seek reconsideration by the National Classification Committee. The Committee's rules governing arbitration and reconsideration are set forth in Article V of its revised National Motor Freight Classification Agreement.

Transportation Arbitration and Mediation, PLLC, has been selected to manage the arbitration process, in accordance with the Committee's rules. Transportation Arbitration and Mediation has available the following arbitrators at 202-263-4152:

John L. Alfano	An attorney-at-law and a transportation professional for over 38 years, Mr. Alfano is a past president of the S.T.B./I.C.C. bar association, A.T.L.L.P. He serves as part-time Acting Judge of the Rye City Court (NY) and is an A.A.A. qualified arbitrator.
Lester M. Bridgeman	Mr. Bridgeman has represented, and opposed, rail and motor carriers, freight forwarders and shippers before the S.T.B., I.C.C. and other Federal agencies and in numerous arbitrations and mediations in over 40 years of transportation law practice.
Thomas J. Burke, Jr.	As legal counsel to both shippers and carriers since 1970, Mr. Burke has appeared regularly before the I.C.C., S.T.B. & F.M.C.S.A. He is a member of the National Panel of Neutrals of the A.A.A and the International Center of Dispute Resolution, Inc.
Betty Jo Christian	A former Commissioner and Vice Chairman of the I.C.C., Mrs. Christian specializes in transportation law, representing carriers and shippers in Federal and State courts and before the S.T.B. and other regulatory agencies.
Emried D. Cole, Jr.	Mr. Cole has 34 years' experience in transportation and regulatory law, including serving as Vice President-Law of a Class I railroad, and 11 years, as a neutral arbitrator & mediator (more than 50 cases, 5 panels of neutrals (including A.A.A. & C.P.R.) & training.
James L. Howe III	Recently retired General Solicitor of NS, Mr. Howe has over 30 years' experience dealing with freight rates and transportation operations and practices, regulated and deregulated. He is on the S.T.B. Ex Parte No. 560 roster of qualified arbitrators.
Fritz R. Kahn	A former General Counsel of the I.C.C., Mr. Kahn maintains an active Washington, DC, transportation law practice, representing shippers and carriers before the S.T.B. and F.M.C.S.A. He was qualified as an ALJ by O.P.M. and as an arbitrator by the A.A.A.
Miles L. Kавaller	A former Assistant Regional Counsel of the I.C.C., Mr. Kавaller has practiced transportation law for almost 30 years, specializing in the collection of freight charges, cargo loss and damage claims and commercial disputes involving insurance coverage.
John H. Kirkemo	A former I.C.C. Regional Director, Mr. Kirkemo has had 24 years' experience administering the Interstate Commerce Act to the transportation industry. A licensed I.C.C. Practitioner, Mr. Kirkemo has investigated, enforced and resolved carrier disputes.
Louis Mackall, V	A former senior counsel in the S.T.B.'s Office of General Counsel and former head of the I.C.C.'s Office of Economics, Mr. Mackall has practiced transportation law for 27 years. He has trained in arbitration and mediation and is well familiar with S.T.B regulation.
A. Daniel O'Neal	Member of the Board of Greenbrier Cos., investor, Chm., Wash. State Freight Mobility Bd., member, Wash. State Transp. Comm., Mr. O'Neal is a former Chairman of the I.C.C., Senate Transportation Counsel, law partner, owner CEO of small business.
Edward J. Reidy	An ALJ for the I.C.C. 1969-1981 and Chief ALJ for the Merit Systems Protection Board 1981-1993, Mr. Reidy has conducted arbitrations for more than 10 public and private organizations since 1994, currently as Chair of the State Dept.'s Arbitration Panel.
Mary Kay Reynolds	A practicing lawyer for more than 20 years, Ms. Reynolds specializes in contract and tort law, concentrating on business litigation and transportation issues on behalf of manufacturing and transportation firms, as well as individuals.

Janice M. Rosenak	A former Legislative Counsel and Administrative Law Judge of the I.C.C., Ms. Rosenak maintains an active transportation practice, representing shippers and carriers. She served as Transportation Counsel for the Senate Commerce Committee.
Henri F. Rush	A former General Counsel of the S.T.B. & I.C.C., with many years of experience with the agencies, Mr. Rush served as counsel to a Senate Committee and as Deputy Administrator of F.R.A. He aided the S.T.B. and I.C.C. alternative dispute resolution program.
Elaine Sehrt-Green	A former Senior Attorney at the I.C.C., Ms. Sehrt-Green has arbitrated and mediated hundreds of disputes for the A.A.A., New York Stock Exchange, N.A.S.D., American Movers Conference and Montgomery County (MD) Bar Association.
William H. Shawn	Former I.C.C. Honors Program attorney, Mr. Shawn maintains a transportation law practice before the S.T.B., F.M.C.S.A, F.A.A. and various courts. Mr. Shawn chaired the T.L.A.'s Practice & Procedure Comm. and is National Arbitration Forum arbitrator.
Kenneth E. Siegel	Former Vice-President Law/Deputy General Counsel of the American Trucking Assns., Mr. Siegel is Of Counsel with the DC office of a large Texas law firm. His practice concentrates in the area of logistics, representing shippers, carriers and intermediaries.
Reese H. Taylor, Jr.	For almost 40 years, as Chairman of the Nevada P.S.C. and Chairman of the I.C.C. and as a transportation attorney, consultant and expert witness, Mr. Taylor has been actively engaged in the resolution of transportation disputes involving shippers, motor carriers and railroads.
Frank J. Weiner	Mr. Weiner maintains an active law practice, representing both shippers and carriers before the S.T.B., F.M.C.S.A. and the courts. He taught transportation courses at Northeastern University in Boston and spoke at the Transportation Law Institute.

TRANSPORTATION ARBITRATION AND MEDIATION, P.L.L.C.  
EIGHTH FLOOR  
1920 N STREET, NW  
WASHINGTON, DC 20036-1601

Tel.: (202) 263-4152  
Fax: (202) 331-8330

**SECTION III**

**ARGUMENT**

III.  
Argument  
A. Standard of Review

On December 10, 2003, the Surface Transportation Board (STB or Board) served its Decision in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement summarily approving the NCC's revised collective classification-making agreement. The Board found that, as revised, the amendments made by the NCC "fully comply" with the agency's requirements. That approval concluded a consolidated proceeding reviewing the NCC's Section 5a Agreement which began almost six years previously with a notice served by the Board on November 13, 1997, and published at 62 Fed. Reg. 60935, seeking public comment on whether to renew the NCC's agreement.

In the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 883 (ICCTA), Congress provided that regulatory approval of existing carrier collective agreements would expire in three years unless renewed by the Board. It was further provided that the Board shall approve the renewal unless it found that renewal is not in the public interest. However, in the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748, Congress revised that requirement and included in 49 U.S.C. § 13703(c) Review, (2) the following subprovision:

Periodic review of approvals.—Subject to this section, in the 5-year period beginning on the date of enactment of this paragraph and in each 5-year period thereafter, the Board shall institute a proceeding to review any agreement approved pursuant to this section. Any such agreement shall be continued unless the Board determines otherwise.

Notwithstanding the final approval of the NCC's Agreement in December 2003, the Board concluded that Section 13703(c)(2) of 49 U.S.C. required the institution of this proceeding.

Section 13703(c)(1) of 49 U.S.C. identifies the standard for review applicable in this proceeding. It is provided that upon review the Board shall change the conditions of approval or terminate an agreement when such action is "necessary to protect the public interest." It is respectfully submitted that nothing exists with respect to the NCC's exercise of its recently approved Section 5a procedures, or the Agreement itself, which requires further agency action necessary to protect the public interest.

B. The National Motor Freight Classification Continues  
To Serve The Public Interest

In National Classification Committee—Agreement, 292 I.C.C. 519, 522 (1956), the former Interstate Commerce Commission (ICC), in granting final approval of the NCC's initial classification-making agreement, found that:

The agreement establishes a code of procedure which enables applicants to utilize an effective means for joint consideration, initiation, and establishment of classification matters. It furnishes a means to avoid destructive competition, promote sound economic conditions, protect shipping interests, and allow carriers an independence of action, free and unrestrained. The collective procedure in conformity with the terms of the agreement is not prohibited by any provisions of Section 5a and it will aid motor carriers to maintain reasonable and nondiscriminatory classifications of property in furtherance of the national transportation policy.

The ICC further concluded that "the agreement is necessary to the effectuation, and is in furtherance, of the national transportation policy...", and that it therefore should be approved. (299 I.C.C. at 253)

The legislative history of the Motor Carrier Act of 1980 unequivocally confirms the value Congress recognizes that the motor carrier classification provides to the entire transportation community. It was stated that:

... [T]he Committee is of the view that the commodity classification system currently in place is a useful tool for shippers, receivers and transporters of regulated freight [s]o all "know what they are talking about" thereby contributing to an efficient and economical transportation system. (H.R. Rept. No. 96-1069, 96<sup>th</sup> Cong., 2d Sess., p. 28 (1980).)

In ensuring that the public continued to have the benefits of the motor carrier freight classification available, Congress limited the discretion the ICC possessed in approving Section 5a Agreements. In defining and narrowing the agency's authority Congress stated that:

In other parts of the rate bureau section of the bill, the Committee has proposed to reduce the amount of discretion that the Commission has to approve or disapprove rate bureau agreements. This reduction in Commission discretion goes hand-in-hand with the other reforms proposed in the rate bureau process. This is a clear example of Congress defining the limits which it believes the Commission should follow in reducing the discretion of the Commission to expand those limits. When the parties to an agreement meet all the conditions in the section, there is a presumption that the Commission should find the agreement to be in the public interest. [H.R. Rept. No. 96-1069, 96<sup>th</sup> Cong., 2d Sess., p. 29 (1980).]

The ICC acknowledged that limitation in provisionally approving the NCC's Agreement which had been amended in response to the requirements of the Motor Carrier Act of 1980 in Section 5a Application No. 61, National Classification Committee—Agreement, served May 18, 1987 (not published). It stated that "under 49 U.S.C. § 10706(b)(2) we are required to approve a collective ratemaking agreement when we find that it fulfills the statutory requirements and is not inconsistent with the national



transportation policy (NTP).” With respect to the conformity of the NCC’s classification activities with the NTP, the ICC concluded that:

A uniform classification system, to the extent the industry chooses to use one, meets many of the motor transportation policy goals of 49 U.S.C. § 10101(a). Classification can promote efficiency, encourage sound economic conditions in transportation, and allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public.

\* \* \*

We conclude that collective and uniform action by NCC in the classification of freight is consistent with the NTP. (Decision, p. 4)

The independent Motor Carrier Ratemaking Study Commission (Study Commission), which was established by the Motor Carrier Act of 1980 to study collective ratemaking, and the continued need for antitrust immunity for that joint carrier activity, had reached very similar conclusions regarding the classification. After conducting extensive hearings and investigations the Study Commission, which consisted of ten members, including three Senators, three Congressmen and four members of the public appointed by the President, concluded that:

Classification can facilitate competition by helping carriers establish cost-related rates and by easing the task of rate comparison by shippers. Classification can also reduce transaction costs involved in the pricing of motor carrier services. (See Report, Collective Ratemaking In The Trucking Industry, p. 455, June 1, 1983).

In considering what would be the appropriate classification system, the Study Commission concluded that it would be a system “with basically the same organizational structure and procedures as the current one.” (See Report, pp. 455-457)

Another extensive review of the classification system was conducted by the ICC in Ex Parte No. MC-98 (Sub-No. 1), Investigation Into Motor Carrier Classification, 364 I.C.C. 906 (1981), 367 I.C.C. 243 (1983), and 367 I.C.C. 715 (1983). In preliminarily assessing the merits of the classification system and its role for the future, the ICC stated that:

Carriers will always need a way of listing their prices. Classifying articles according to their relative transportation characteristics is one way of starting to assemble a rational pricing system. (364 I.C.C. at 911)

Again, in its subsequent review of its interim decision in that proceeding, the ICC reiterated that "the usefulness of the current commodity classification is not disputed." (367 I.C.C. at 245)

On further review the ICC abandoned the elimination of the single rating number or class, the elimination of value per pound as a relevant transportation characteristic, and the ordering of the transportation characteristics as to their relative importance, which it had initially proposed. In a separate opinion, then Commissioner Gradison concluded that:

I agree with the outcome of this decision, which abandons the Commission's ill-advised proposal to replace the National Motor Freight Classification with an inefficient and unworkable "information based system" in which individual rate bureaus, and perhaps even individual carriers, would have published separate classifications. The decision properly reflects the chaos and needless confusion that this proposal would have visited upon the shipping public. The decision retains the essential elements of the National Motor Freight Classification, while removing from it the vestiges of the collective ratemaking system.

\* \* \*

...[T]he Classification is the useful product of many decades of careful work. It helps both carriers and shippers to do their work

more efficiently. The Congress has recognized this and has found that the Classification will be as useful under the system in which carriers make individual rates as it was under the system in which carries make collective rate decisions. It assists new entrants into the motor carrier industry to make rational rate decisions, and it promotes the cost based rate system mandated by the Motor Carrier Act of 1980. (367 I.C.C. at 259-260)

Even when Congress subsequently broadened the powers of the ICC in the administration of the Interstate Commerce Act, it excluded classification matters from the reach of that new authority. In the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), Section 10505 of 49 U.S.C. was amended to expand the ICC's authority to exempt various motor carrier activities from regulation. Notably, however, Congress established specific limitations on the ICC's new exemption authority so that it would not be exercised "to relieve a motor carrier of property or other person from the application or enforcement of the provisions of sections 10706..." [the section governing collective rate and classification making]. Specifically, Congress, as pertinent, excluded from this exemption authority, "any law, rule, regulation, standard, or order pertaining to...antitrust immunity for...[the] classification of commodities (including uniform packaging rules), uniform bills of lading, ..." Thus, in TIRRA, Congress expressly excluded from the ICC's broadened exemption authority any element of collective classification making that was, and is protected by antitrust immunity.<sup>1</sup>

In the Interstate Commerce Commission Termination Act of 1995 (ICCTA) Congress once more recognized and preserved the continued public interest value of the collectively-made motor carrier freight classification. In 49 U.S.C. § 13703(a) provision

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<sup>1</sup> It is also noted that in Section 601(h)(3)(A)(iv) of the Federal Aviation Administration Authorization Act of 1994, Congress, while preempting state economic regulation of motion carriers, preserved the authority of a state to grant antitrust immunity for classifications upon carrier request and where such state regulation is no more burdensome than the federal regulation.

was made for the continued establishment of agreements between carriers to collectively make classifications. Section 13703(a)(6) provided that such activities would be conducted with immunity from the antitrust laws; and Section 13703(e) grandfathered existing approved agreements as if they took effect on the effective date of the legislation.

While then former Section 13703(d) provided that agreements would expire three years after the date of approval, Congress specified that renewal could be sought by the parties to the agreement, and that the STB "shall approve" the renewal unless such action is shown not to be in the public interest. Congress also provided that the parties to an agreement could continue to act thereunder while their request for renewal was pending.

Congress specifically defined the circumstances in which the STB would be empowered to change or modify the conditions or approval of an agreement. As provided in 49 U.S.C. § 13703(c), the STB, when reviewing an agreement approved under Section 13703, either upon its own motion or on request, can change that approval or the conditions on which approval was predicated only if such revision is "necessary to protect the public interest."

In the Motor Carrier Safety Improvement Act of 1999, Congress eliminated the provision in former Section 13703(d) of 49 U.S.C. of 49 U.S.C., requiring the automatic expiration of rate bureau agreements after three years unless renewed by the STB. In its stead, in 49 U.S.C. Section 13703(c)(2), Congress provided for a review of Section 5a agreements in 5-year periods beginning on the December 6, 1999 effective date of the enactment of that Act. Under 49 U.S.C. Section 13703(c)(1) that review remains subject

to the "necessity to protect the public interest" standard for changing the conditions of approval or termination of the agreement.

As indicated, commencing with a Federal Register Notice published on November 13, 1997, the Board instituted a proceeding reviewing further approval of the NCC's collective classification-making agreement. In its Decision in the consolidated proceedings in Section 5a Application No. 61 (Sub-No. 6) and Section 5a Application No. 61, National Classification Committee—Agreement, the Board required modifications which it concluded would give shippers more information at an earlier stage in the classification process; and provided for a right of review by a neutral arbitrator of initial NCC classification decisions. Shippers also retained the statutory right to subsequently challenge the reasonableness of a classification before the Board.

The STB further concluded that:

The changes required as a condition of our approval should improve the classification process by eliminating the perception of bias. This, in turn, should encourage shippers to participate in the entire process from the initiation of research through completion of the process. Central to the improvements are the public availability of the information on which classification decisions are made, including raw data supporting studies and reports. (November 2001 Decision, p. 23)

On March 20, 2003, the NCC submitted its revised agreement incorporating the modifications identified in the Board's November 2001 Decision, implementing the agency-prescribed action timeline. Interested persons were provided an opportunity to comment on those changes. In its Decision served on March 27, 2003, in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement, the Board renewed approval of the NCC's Agreement pursuant to 49 U.S.C. § 13703, provided that certain additional, specified modifications were made. It concluded that:

The NCC's revised Agreement complies with the requirements set forth in the 2001 Decision in all material respects. The Agreement clearly and unequivocally provides a right to have a neutral arbitrator review any initial NCC decision, and ensures that shippers will have much greater access to staff assistance, staff reports and analyses, and various data, files, and compilations of information. The entities submitting comments in response to the revised Agreement for the most part acknowledge this, and the concerns they have expressed deal more with the particulars of how the Agreement will work rather than questioning its overall thrust. (March 2003 Decision, pp. 2-3)

On June 5, 2003, the NCC filed a new draft revised agreement attempting to comply with the agency's findings in the March 2003 Decision. No comments on the NCC's revised draft were received. In a Decision served on October 16, 2003, in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement, the Board, noting NCC's good faith effort to comply with the March 2003 Decision, identified two further issues requiring changes. The first involved the use of protective orders, and the second involved the preservation of the statutory right to petition for suspension of decisions affirmed by arbitrators.

On November 17, 2003, the NCC submitted its amendments in compliance with the October 2003 Decision. In a Decision served on December 10, 2003, the Board, concluding that all required modifications to the NCC's Agreement had been made, approved the Agreement and discontinued the proceeding.


No collective process has been subjected to the extensive review that the classification has, or is any collective process more open and conducive to shipper participation than that of the NCC. Freight classification consistently has been recognized as being in the public interest and advancing the goals of the National Transportation Policy. Clearly, the most recent round of Board proceedings has made

accessible to the public all the data and information upon which classification actions are based, and public participation in the classification process is facilitated by the revised procedures available under the NCC's Agreement. Moreover, any classification action is subject to review by a neutral arbitrator, as well as under the Board's regulatory review. It is submitted, to an even greater degree because of the recent modifications required by the Board, that the NMFC continues to promote efficiency, encourages sound economic conditions in transportation, allows a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public, and promotes competitive and efficient transportation pricing and services. Nothing in the NCC's recently approved collective classification procedures, or the NCC's administration of those activities, creates the need for further agency action to protect the public interest.

IV.  
Conclusion

For all the foregoing reasons, the National Classification Committee requests that the Board continue its approval of the NCC's Section 5a Agreement with antitrust immunity. Absent antitrust immunity carriers will not participate in the process and the benefits of collective classification-making activities will be lost.

Respectfully submitted,

  
John R. Bagileo  
Law Office of John R. Bagileo  
1101 30th Street, NW  
Suite 300  
Washington, DC 20007  
Phone: (202) 944-3736  
FAX: (202) 944-8611

Counsel for National Motor Freight  
Traffic Association, Inc. and the  
National Classification Committee

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